

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

CONDALEE MORRIS,  
CDCR #V-96203,

Plaintiff,

vs.  
ARNOLD SCHWARZENEGGER;  
MATTHEW CATE; LARRY SCRIBNER;  
JOSE BUILTEMAN; J. SANDOVAL;  
T. CANADA; K. BALL,

Defendants.

Civil No. 10cv1305 JAH (NLS)

**ORDER:**

- (1) DENYING MOTION FOR APPOINTMENT OF COUNSEL; and**  
**(2) DISMISSING FIRST AMENDED COMPLAINT FOR FAILING TO STATE A CLAIM PURSUANT TO 28 U.S.C. §§ 1915(e)(2)(B) & 1915A(b)**

**I.**

**Procedural History**

On June 17, 2010, Condalee Morris (“Plaintiff”), a state prisoner currently incarcerated at Calipatria State Prison located in Calipatria, California, and proceeding in pro se, filed a civil rights Complaint pursuant to 42 U.S.C. § 1983. In addition, Plaintiff filed a Motion to Proceed *In Forma Pauperis* (“IFP”), along with a Motion for Appointment of Counsel and a “Request for Court to Grant the Permanent Injunction.” [Doc. Nos. 2-4.]

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1 On August 25, 2010, the Court granted Plaintiff's Motion to Proceed IFP, denied  
2 Plaintiff's Motion for Appointment of Counsel, denied Plaintiff's Motion for Permanent  
3 Injunction and sua sponte dismissed his Complaint for failing to state a claim. *See* Aug. 25,  
4 2010 Order at 7-8. Plaintiff was granted leave to file an Amended Complaint in order to correct  
5 the deficiencies of pleading identified by the Court. *Id.* at 8. On September 23, 2010, Plaintiff  
6 filed his First Amended Complaint ("FAC").

II.

## **MOTION FOR APPOINTMENT OF COUNSEL [Doc. No. 12]**

9 Plaintiff requests the appointment of counsel to assist him in prosecuting this civil action.  
10 The Constitution provides no right to appointment of counsel in a civil case, however, unless an  
11 indigent litigant may lose his physical liberty if he loses the litigation. *Lassiter v. Dept. of Social*  
12 *Services*, 452 U.S. 18, 25 (1981). Nonetheless, under 28 U.S.C. § 1915(e)(1), district courts are  
13 granted discretion to appoint counsel for indigent persons. This discretion may be exercised only  
14 under “exceptional circumstances.” *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991). “A  
15 finding of exceptional circumstances requires an evaluation of both the ‘likelihood of success  
16 on the merits and the ability of the plaintiff to articulate his claims pro se in light of the  
17 complexity of the legal issues involved.’ Neither of these issues is dispositive and both must be  
18 viewed together before reaching a decision.” *Id.* (quoting *Wilborn v. Escalderon*, 789 F.2d 1328,  
19 1331 (9th Cir. 1986)).

20 The Court denies Plaintiff's request without prejudice, as neither the interests of justice  
21 nor exceptional circumstances warrant appointment of counsel at this time. *LaMere v. Risley*,  
22 827 F.2d 622, 626 (9th Cir. 1987); *Terrell*, 935 F.2d at 1017.

III.

**SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

25 The PLRA also obligates the Court to review complaints filed by all persons proceeding  
26 IFP and by those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused  
27 of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or  
28 conditions of parole, probation, pretrial release, or diversionary program,” “as soon as

1 practicable after docketing.” *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these  
 2 provisions of the PLRA, the Court must sua sponte dismiss complaints, or any portions thereof,  
 3 which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who  
 4 are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A.

5       **A. 42 U.S.C. § 1983 Liability**

6       Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person  
 7 acting under color of state law committed the conduct at issue, and (2) that the conduct deprived  
 8 the claimant of some right, privilege, or immunity protected by the Constitution or laws of the  
 9 United States. *See* 42 U.S.C. § 1983.

10      **B. Eighth Amendment Inadequate Medical Care Claims**

11     Here, once again, Plaintiff claims that he was “denied and delayed medical care” for a  
 12 period of five days. FAC at 7. Plaintiff alleges that during these five days he complained of  
 13 “chest pain, shortness of breath, and pain in his lower back area, along with blood in his urine  
 14 and stool.” *Id.*

15     As the Court previously informed Plaintiff, in order to assert a claim for inadequate  
 16 medical care, Plaintiff must allege facts which are sufficient to show that each person sued was  
 17 “deliberately indifferent to his serious medical needs.” *Helling v. McKinney*, 509 U.S. 25, 32  
 18 (1993); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Hunt v. Dental Dept.*, 865 F.2d 198, 200  
 19 (9th Cir. 1989). To be liable, prison officials must purposefully ignore or fail to respond to  
 20 Plaintiff’s pain or medical needs. *Estelle*, 429 U.S. at 105-06.

21     Thus, to state a claim, Plaintiff must allege facts sufficient to show both: (1) an  
 22 objectively “serious” medical need, i.e., one that a reasonable doctor would think worthy of  
 23 comment, one which significantly affects his daily activities, or one which is chronic and  
 24 accompanied by substantial pain, *see Doty v. County of Lassen*, 37 F.3d 540, 546 (9th Cir. 1994);  
 25 and (2) a subjective, and “sufficiently culpable” state of mind on the part of each individual  
 26 Defendant. *See Wilson v. Seiter*, 501 U.S. 294, 302 (1991).

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1       While Plaintiff alleges that he was denied medical treatment for five days, there are no  
 2 facts in the First Amended Complaint from which the Court can determine whether he has  
 3 suffered any injury as a result of the Defendants alleged delay in providing treatment. *See*  
 4 *Shapley v. Nevada Bd. of State Prison Comm'rs*, 766 F.2d 404, 407 (9th Cir. 1985) (a prisoner  
 5 can make "no claim for deliberate medical indifference unless the denial was harmful.")  
 6 Accordingly, Plaintiff's Eighth Amendment claims are dismissed for failing to state a claim upon  
 7 which relief may be granted.

8           **C. Supplemental State Law claims**

9       Plaintiff also seeks relief under a number of state law claims. However, because the  
 10 Court dismisses all federal claims in the First Amended Complaint, the Court declines to  
 11 exercise supplemental jurisdiction over Plaintiff's state law claims. *See* 28 U.S.C. § 1337(c)(3);  
 12 *see also Schultz v. Sundberg*, 759 F.2d 714, 718 (9th Cir. 1995) (generally, dismissal of federal  
 13 claims before trial dictates that state pendent claims should be dismissed.) These claims are  
 14 dismissed without prejudice to Plaintiff to either pursue in state court or amend his First  
 15 Amended Complaint to correct the deficiencies noted in this Order.

16       Accordingly, the Court finds that Plaintiff's First Amended Complaint fails to state a  
 17 section 1983 claim upon which relief may be granted , and is therefore subject to dismissal  
 18 pursuant to 28 U.S.C. §§ 1915(e)(2)(b) & 1915A(b). The Court will provide Plaintiff with an  
 19 opportunity to amend his pleading to cure the defects set forth above. Plaintiff is warned that  
 20 if his amended complaint fails to address the deficiencies of pleading noted above, it may be  
 21 dismissed with prejudice and without leave to amend.

22           **IV.**

23           **CONCLUSION AND ORDER**

24       Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

25       1. Plaintiff's Motion for Appointment of Counsel [Doc. No. 12] is **DENIED** without  
 26 prejudice.  
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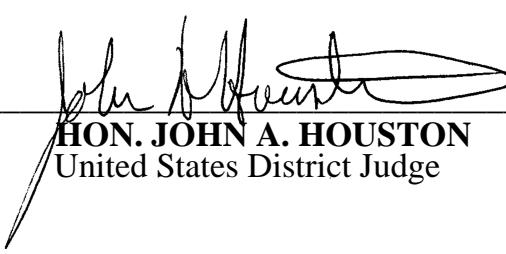
1           **IT IS FURTHER ORDERED** that:

2       2. Plaintiff's First Amended Complaint is **DISMISSED** without prejudice pursuant  
3 to 28 U.S.C. §§ 1915(e)(2)(b) and 1915A(b). However, Plaintiff is **GRANTED** forty five (45)  
4 days leave from the date this Order is "Filed" in which to file a Second Amended Complaint  
5 which cures all the deficiencies of pleading noted above. Plaintiff's Amended Complaint must  
6 be complete in itself without reference to the superseded pleading. *See* S.D. Cal. Civ. L. R. 15.1.  
7 Defendants not named and all claims not re-alleged in the Amended Complaint will be deemed  
8 to have been waived. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987)

9       3. The Clerk of Court is directed to mail a form § 1983 complaint to Plaintiff.

10           **IT IS SO ORDERED.**

11           DATED: October 6, 2010

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HON. JOHN A. HOUSTON  
United States District Judge